IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 28 of 1991

with

CRIMINAL APPEAL No 63 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

FARUQMIYA N MALEK

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 28 of 1991
MR BS SUPEHIA for Petitioner
MR KC SHAH, APP, for Respondent No. 1

2. Criminal AppealNo 63 of 1991
MR NITIN M AMIN for Petitioner
MR KC SHAH, APP, for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 03/02/98

ORAL JUDGEMENT (Per S.M.Soni, J.)

Criminal Appeal No.29/91 is by original accused No.3 and Criminal Appeal No.63/91 is by accused Nos.1 &2 of Sessions case No.77/89. Respective accused have filed these appeals against the judgment and order of conviction dated 7th December 1990 passed by the learned Sessions Judge, Sabarkantha at Himatnagar. The learned Sessions Judge by the judgment and order held accused No.3 guilty under section 302, 324 and 506(2) of the Indian Penal Code and awarded respective sentence of rigorous imprisonment for life, rigorous imprisonment for two years and fine of Rs.500/- in default rigorous imprisonment for six months and rigorous imprisonment for six months, respectively. Learned Sessions Judge has ordered the substantive sentence to run concurrently. Original accused Nos.1 & 2 are held guilty under section 302 read with section 34 and 324 read with 34 and section 506(2) of the Indian Penal Code. They are also ordered to undergo sentence as ordered in case of original accused No.3, however concurrently. The accused have preferred these appeals.

2. Few facts leading to the prosecution of the accused are as under :

Police Inspector, P.W.10, who was on patrol duty at 11.00 a.m. on 18th July, 1989 was informed on his return to the Police Station by the Police Station Officer that there was scuffle on the canal in Chhaparia area of Himatnagar town. P.W.10, therefore, in company of some police personnels rushed to the scene of offence in his jeep car. When P.W.10 reached there, all the shops around in the area were closed and he found pool of blood at one end of the canal. On inquiry from the persons standing there, he learnt that there was scuffle between Muslims and Marwadis and injured were removed to hospital. He, therefore, reached the Civil Hospital, Himatnagar and found P.W.6, 7 and 8 as well as accused No.3 admitted in the hospital. He found that one Madanlal Ranchhoddas was dead. Complaint of Fufaram, PW 6, was recorded and sent to the Police Station Officer to register the offence. The offence was registered. Investigation carried out and completed. On completion of the investigation, chargesheet was submitted against all the accused in the Court of Chief Judicial Magistrate, Himatnagar, who in his turn, committed the case to the Court of Sessions Judge, District Sabarkantha at Himatnagar where the case was registered as Sessions Case No.77/89.

3. The learned Sessions Judge framed charge against the accused. The accused pleaded not guilty and prayed to be tried. The prosecution led necessary evidence to prove the charges levelled against the accused. On completion of the prosecution evidence further statement under section 313 of the Code of Criminal Procedure, 1973 was recorded. In that statement all the accused have pleaded total denial initially. However, thereafter, accused No.3 has filed one additional written statement wherein he has come out with the theory of self-defence which we will deal in detail at an appropriate stage. No defence witness was examined. The learned Sessions Judge after hearing the learned Additional Public Prosecutor and the defence advocate Mr H.N.Zala held the accused guilty of the offence charged against them and awarded respective sentence referred to hereinabove. This judgment and order is assailed in these appeals.

4. Learned Advocate Mr.B.S.Supehia for accused No.3 and learned advocate Mr.Nitin M. Amin for accused Nos.1 & 2 have their common submissions. They have challenged the conviction mainly on the ground that oral evidence of eye witnesses have been wrongly accepted by the learned Sessions Judge. The evidence of such witnesses is neither corroborated by medical evidence nor by any independent witness though available and cited in chargesheet, yet not examined in the Court. They have contended that all the three eye witnesses, namely, P.W.6, 7 and 8 in the previous statements have stated contrary to what they have stated before the Police in their police statement as well as before the Court and therefore their evidence ought not to have been accepted. They also contended that the prosecution witnesses are guilty of suppression of material fact inasmuch as they have not explained the injuries on the person of accused No.3. They have, therefore, contended that the evidence only creates suspicion and the same ought not to have been accepted. In the alternative, Mr Amin has contended that the alleged act which amounts to offence was committed by accused No.3 in his self-defence as all these three witnesses, P.W.6, 7 & 8 were assaulting him and he just escaped and had given knife injuries to save himself. Mr. Amin further contended that in the facts and circumstances of the case, it cannot be said that accused No.3 has exceeded in his self-defence. In view of these facts, it is contended that all the accused ought to have been acquitted by the learned Sessions Judge.

5. Learned APP, Mr K.C.Shah, has contended that if

the evidence of these eye witnesses, viz. P.W.6, 7 & 8, who are also injured witnesses, are properly read in the perspective of the case, then the judgment and order of the learned Sessions Judge does not call for any interference. Mr Shah further contended that the contradiction proved during the evidence of P.W.9, Pashabhai, Executive Magistrate, who is alleged to have recorded the dying declaration, which is now required to be treated as a previous statement, is not proved in accordance with law. Therefore, any of such contradictions cannot be held against the said witnesses either to reject their evidence or to make their evidence suspicious one. Mr Shah further contended that when there is sufficient evidence of injured eye witnesses, P.W.6, 7 & 8, non-examination of other witnesses though alleged to be eye-witnesses and independent one does not adversely affect the prosecution case. It is not shown that by non-examination of said eye witnesses what adverse inference is required to be drawn? Either they would be eye witnesses or they would not have seen the incidence. Mr Shah further contended that for non-examination of those witnesses, no adverse inference to the effect that the victims were not injured and others were the assailants can be inferred. Mr Shah, therefore, contended that the appeals deserve to be dismissed.

6. Before dealing with the evidence of P.W.6, 7 & 8 individually it will be necessary to decide whether the contradictions in their evidence through the previous statements recorded by P.W.9, Pashabhai can be relied upon or acted upon. There is no dispute about the fact that P.W.10, issued yadi to P.W.9 to record dying declarations of P.W.6, 7 & 8 and accused No.3. The said P.W.9, Executive Magistrate had gone to the hospital and according to him, recorded dying declarations of the said witnesses and accused No.3. However, the said witnesses and accused No.3 having survived, though the statements lose the significance of being a dying declaration, they retain the character of previous statements. It will be relevant to refer to section 145 and 157 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Evidence Act'). Section 145 reads as under :

> "145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called

to those parts of it which are to be used for the purpose of contradicting him."

Section 157 reads as under :

"157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

In our opinion, section 145 is more relevant in the facts of the present case. Section 145 of the Evidence Act contemplates that before contradicting a person as to his previous statement, his attention is required to be drawn to that part of evidence. But before the attention is drawn to that part of the evidence, it is necessary first to prove that previous statement. In the instant case, P.W.6, 7 & 8 have specifically denied that Executive Magistrate has recorded their statement in the hospital. Thus when the witnesses denied to have recorded their statement, it was the prime duty of the prosecution to first prove the recording of those statements and after proof of such statement being recorded bring it to the notice of the witness to those part of statement which are proposed to be used for the purpose of contradicting him. In the instant case, when the witnesses P.W.6, 7 & 8 have denied to have given any previous statements, it is necessary to prove that their previous statements are recorded. For this purpose, it will be relevant to refer to the evidence of P.W.9, Pashabhai, Executive Magistrate. P.W.9, Pashabhai, in his evidence has stated that "on 18th July, 1987, I received one yadi from Police Inspector of Himatnagar Town Police Station. I was requested by the said yadi to record the statements of Kanaiyalal, Ranchhoddas Achalda and Fufaram Waghaji. I received that yadi at 5 O'clock in the evening ......then my clerk Shri Vyas and myself went to the hospital. .....There one peon was standing. I asked him where is Ranchhodbhai .....Ranchodbhai was lying in a bed. I asked his name. Then the man lying in the bed told me that he is Ranchhodbhai Achhalda. Ranchhodbhai was conscious. I asked him as to how the scuffle took place. Then he told how he was injured. Then I recorded his statement in the manner he dictated. Thereafter I went to my office. Now I say that after recording the statement, I read over the statement to him and obtained

his signature. Then I went to Mamlatdar's office with the statement. ..... I placed that statement in the cub-board ..... I have brought that statement ..... Again I went to hospital by about 6.15 p.m. ..... I inquired from a Lady Doctor as to where Kanaiyalal was admitted and she showed me the bed of Kanaiyalal. Kanaiyalal was in ward No.28. There are 5 coats in ward No.28. The lady doctor showed me Kanaiyalal. I interrogated and recorded his statement. I read over the same to him and took his signature. In the opposite room Fufaram was there. I inquired of him about his name etc. Then I recorded his statement which was read over to him and I took his signature".

7. By this part of the evidence, the prosecution wants to suggest and the defence wants to rely on the suggestion that this part of evidence is a proof of recording statements of P.W.6, 7 & 8 by P.W.9, Executive Magistrate. Whether the said statements can be said to have been proved ? It is for the Court to decide whether the said statements are proved in accordance with law. We are of the opinion that the said statements are not proved as required under the law of evidence. Any statement, if required to be proved, some formalities are required to be gone into more particularly when the statement bears signature. Unless the signatures are proved to be of the signatory, the said statement cannot be said to have been proved.

8. Section 3 of the Evidence Act has given interpretation of the word 'proved' which is referred in the Evidence Act. Word 'proved' means a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probably that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists to lead to a conclusion that the existence of such document is so probable to rely on the same, under the circumstances of the present case. In the present case, P.W.9 has simply stated before the Court that he went to the hospital and inquired from someone to find out P.W. 6, 7 & 8 and interrogated them, took down their statements and also took their signatures below the same. P.W.6, 7 & 8 have specifically denied to have made and signed any such statements before the Executive Magistrate. In view of the denial, it was necessaary to prove the signature below that statement as required under section 67 read with section 49 of the Evidence Act. PW 9 has stated that he recorded statement of PW 6, 7, 8 and obtained their signatures below it.

This statement that PW 6, 7 and 8 have signed the statement, by itself is not the proof of signature. Some formal questions are required to be asked and if the answer thereof is in affirmative then the document can be said proved and required to be exhibited. Then it can be read in evidence. Those formal questions are whether the said document is executed by the witness ? Whether the contents are true ? Whether it bears your signature ? If the document is to be proved through some third party then the formal question to be put and answers to be in affirmative are (1) whether the document is executed in your presence or within your knowledge ? Whether the contents are true ? Whether it is signed in your presence or you know the signature of signatory being acquainted with it ? Signature to the document can be proved either examining expert or prove the document by comparison with the admitted signature. Unless this procedure is followed, document is not proved and cannot be read in evidence. This procedure being not followed the said statements of PW 6, 7 & 8 are not proved. As they are not proved they cannot be used for the purpose to contradict the witnesses.

9. P.W. 9 has not stated before the Court by referring to that statement, which was, according to him, duly signed by the respective witnesses; that the signature below the statement was that of a particular P.W. and that the said P.W. had signed in his presence and/or he knows the same. In absence of this part of evidence, there is no proof of signature of P.W.6, 7 & 8 below the alleged previous statements. When the signatures are not proved below the statements and when the alleged signatories have denied to have give much less signed any such statement, it cannot be said that the prosecution by evidence of P.W.9 has proved the previous statement. This apart, when any part of the evidence is required to be contradicted, then it is necessary, first to ensure that he has made such a statement. If he admits to have made such a statement, it stands proved and nothing more is required to prove the same. But if he denies to have made such a statement, then the person who has recorded the statement has to prove that he has recorded the statement of that witness and that the witness in that statement has deposed or stated as stated therein. In our opinion, in the instant case, the prosecution has failed to prove the previous statements of P.W.6, 7 & 8.

10. Question may arise that this law pertaining to proof of a document to rely upon the document is not applicable to the defence. The defence can put any

question relying on any document relied on by the prosecution even if that document is not proved. It is true that the defence has a very wide prospective while cross-examining the witness. But simply because the prosecution has produced a particular document saying that they rely on the said document, that by itself is not a proof of the document. When the author of the same disputes the execution even the defence is required to prove that document or bring before the Court necessary material to hold that it is a document executed or it is a statement of a person though he denies the same. Defence is required to put on record necessary material to show that the author is wrongly denying the execution thereof. Either the prosecution or the defence has to bring on record necessary materials to show that the author wrongly denies the execution thereof and after bringing such materials, such a document can be relied on or acted upon. In the instant case, neither the prosecution nor the defence has brought on record necessary evidence to make the court believe that such a statement was recorded by the Executive Magistrate, P.W.9. We are of the view that there is nothing on record from which one can infer that P.W.6, 7 & 8 have made such statements before the Executive Magistrate.

11. Apart from the above discussion, manner, method, preserving and stage at which it is produced make the recording of such statements by Executive Magistrate a little doubtful one.. P.W.9, Executive Magistrate, was asked to go to record dying declaration of P.W.6, 7 & 8 and accused No.3. P.W.9 has stated that till the date of his deposition, he has recorded as many as 50 dying declarations. Necessary formalities before recording dying declarations are not only required to be known by the persons recording dying declarations but is required to be gone into and followed scrupulously. Dying declaration is a piece of evidence acted upon by the Courts on the assumption that dying man normally do not lie. The fact is required to be first established that the man is dying or is about to die or is in such a condition that there are no chances or prospect of his survival. P.W.9 has failed in his duty firstly to verify by necessary inquiry about the physical condition of the author of the alleged statement. He has not recorded statement in question answer form which is normally expected of. Unfortunately, when the statements are not on record, it cannot be said that non-compliance of the above requirements is vital or not. As this is the state of affair, the evidence of P.W.9 does not inspire any confidence to accept it. On receipt of yadi, he goes to the hospital. The manner and method in which he has

inquired of the persons whose statements he was required to record does not inspire any confidence. He simply relies on irresponsible persons on his own assumption as to the identity of those persons. Normally, a dying declaration is to be recorded of the person who is in a very serious condition of health. It is, therefore, necessary to verify from the Doctors attending the person whose dying declaration is to be recorded is conscious and rational. That question does not arise in the instant case as the statement has not remained to be a dying declaration. But when it was recorded, it was under expectation that it may be used as a dying declaration. Absence of necessary precautions by the Executive Magistrate, P.W.9, speaks adverse of him. Apart from this, he has not proved the signature which he purports to be of the person who according to him have signed particularly when the authors have denied to have given any such statement and signed below it. Unless the signature below the statement is proved, the said statement, in our opinion, cannot be relied upon to prove contradictions as contemplated in section 145 of the Evidence Act.

12. Assuming that such statement is proved, then also the question remains whether the contradictions are duly proved in accordance with law or not. P.W.9 was asked certain questions in cross-examination with respect to the previous statement of the witness is concerned, namely, P.W.6, 7 & 8. P.W. 7 is alleged to have stated before the Executive Magistrate as under :

> "..... today in the morning at about 12 O'clock I was given slap by one person on a misunderstanding that some two-three days before a joke was cut against a Muslim woman and I was that person.
>
> ..... that all the three accused have given a threat to Madanlal at my house that we will not leave Kanaiyalal alive ...
>
> ..... my father and my brother where coming near canal and they were also assaulted by knife and stick."

If we refer to the evidence of P.W.7, he has first denied to have made any statement before the Executive Magistrate. He has stated that ".... I have not given any statement before the Magistrate. I have not stated that I was given slap by one person on misunderstanding that a joke was cut on a Muslim woman some two-three day

before and that I was that person". No other part of his alleged statement before the Executive Magistrate is brought to his notice in his examination and therefore, in our opinion, any of the statements even if proved by evidence of P.W.9 cannot be used against Kanaiyalal P.W.7.

13. So far as the evidence of Ranchhoddas, P.W.8 is concerned, he has denied to have made statement before the Executive Magistrate. He has denied to have stated the following facts in the reply. He denied that statement was recorded before the Magistrate. He has denied to have stated as under:

> "Today at about 12.00 noon, I was going to the house of Kanubhai from my house to call him. By that time, near canal, there was scuffle between Kanaiyalal and Madanlal who are my sons and some other persons. At that time my son Madan was hit by crowbar, I was injured by stone on my private part and, I became unconscious and fell down near canal."
>
> " ..... it is denied that Farooq was injured with knife and by us..."

Except this part of the statement, no other part of alleged statement before the Executive Magistrate is brought to the notice of this witness.

14. P.W.6 Fufaram has also denied that his statement was recorded by any Magistrate at 6 O'clock in the evening. He has denied that Executive Magistrate has come to him in the evening at 6.00 p.m. and he has stated that three persons had come to the house in the morning. He has denied to have made the following statement before the Magistrate:

> ".... in the morning I was cutting betelnut at the house of Kanaiyalal at about 11.30.
> ..... There were 4 to 5 persons on the cabin and these persons assaulted me and my master Kanaiyalal and gave a knife blow ..... I do not know these persons."

Except this alleged statement before the Executive Magistrate, nothing more is brought to the notice of P.W.6. While in the cross examination of P.W.9, practically an attempt is made to prove the whole of the statement. It is now settled law that part of the statement which is brought to the notice of the witness

can only be brought in evidence of the witness who has recorded the alleged previous statement. Whatever is brought to the notice of the witness is not such which may affect, much less adversely, to the substantive evidence. Therefore, the whole procedure to contradict the previous statement is improper and in violation of the settled principle of law and in particular section 145 of the Evidence Act. Therefore, in our opinion, that part of evidence which according to the defence causes dents in the evidence of the prosecution witnesses Nos.6, 7 & 8 is inadmissible in evidence and should be ignored.

15. Keeping the above discussion in mind, it is now necessary to see whether barring that part of evidence of witness, the prosecution is able to prove the charge. P.W.6 has deposed :

> "....Since about 8 months I am in employment with Ranchhoddas of Himatnagar. I was employed by Ranchhoddas for cutting betelnut. I served there for about a month. Ranchhod has two sons. One Kanaiyalal and other Mandanlal. I was residing with Kanaiyalal at Shaktinagar. The incident took place some 8 months before. On that day I was cutting betelnut at about 11 O' clock in the morning. I was cutting betelnut at the house of Kaniayalal. At that time, Madanlal, Ranchhoddas and myself were in the house. At that time, all the three accused came to the house of Kanaiyalal. Faruqbhai, one of the accused, was inquiring where is Kanaiyalal saying that he has cut a joke against my bhabhi and we will not leave him alive today. Madanlal replied that Kanaiyalal is not in the house.He further told that he will explain him when he comes home. Of all the accused, one had a Rampuri knife, one had an iron pipe and one had an iron strip. Thereafter, all the three accused went towards canal. After some time, Kanaiyalal returned home. After coming home, Kanaiyalal proceeded towards Motipura with scrap of betelnuts in his bag, on scooter. Kanaiyalal was intercepted by the accused on bridge of canal. Kanaiyalal, therefore, tried to return back and shouted. On hearing the shouts, Madanlal rushed to that place. I immediately followed Madanlal. Faruq had a knife in his hand which was held by Madanlal. Ranchhoddas also followed us. Accused Makbukshah and Hajimsha assaulted Madanlal with their weapons and therefore Farooq's hand holding

the knife as held by Madanlal was released. Then Farooq assaulted Madanlal with knife. I therefore intervened to rescue him. Farooq gave knife blow on my back. Ranchhoddas also intervened to rescue Madanlal. He was also given knife blow by Farooq. I fell down and I was injured. After assaulting all the three accused ran towards Chhaparia. Kanaiyalal was also injured, but I do not know who injured him."

This evidence of witness is challenged in the cross-examination mainly on the ground that he was not knowing the names of the accused prior to the incident. He has admitted that he knew the names of the assailants in the hospital. The evidence of this witness is also challenged on the ground that he has come up with some different version before the Executive Magistrate.

16. As discussed above, challenge to the evidence of this witness does not survive on the ground that he has stated something else before the Executive Magistrate as the same is not admissible in law. However, the evidence of this witness is challenged on the ground that he is a got up witness and has not seen the incident. The defence has relied on his evidence in cross-examination that he was not knowing the names of the assailants at the time when he filed the complaint. In the examination-in-chief, he has stated as to how he came to know the names of assailants. In the F.I.R. he has given the names of the assailants. Then this statement, in our opinion, do not destroy his evidence as to names as it appears to have been given under some wrong conception of fact or under misunderstanding. At this juncture, it will be relevant to refer to an additional fact that this witness is an injured one and he has ascribed his injuries to accused. The accused in his additional statement, Ex.59 has stated as under :

"..... On the preceding day of the incident, Kanaiyalal has intercepted Mumtazbibi at about 5.00 p.m. when she was returning from school and she was asked to ride on pillion. This was complained to Makbulsha by Mumtazbibi. Therefore, on the day of incident, Makbulsha asked Fufaram, who was an employee of Kanaiyalal while he was passing near the cycle shop to send Kanaiyalal to the shop. After some time, Kanaiyalal came to the cabin. Makbulsha was persuading Kanaiyalal not to cut joke of Mumtazbibi. Kanaiyalal got angry and there was verbal exchange. After some time of that verbal

> exchange, Kanaiyalal, Madanlal, Ranchhoddas and Fufaram and other three persons came on bicycle with sticks and pipes. At that time, seeing these persons coming Makbulsha and Hajimsha ran away from the cabin and I was caught by those persons. All the above 4 persons started beating me with sticks and pipes and I then fell down and had a blow of pipe on head. One of those 7-8 persons had injured me with knife on hand. At this time, I (accused No.3) apprehended that all the 7 to 8 persons would kill me. Therefore, to save myself, I took out knife from my pocket and inflicted blow on Madanlal. After inflicting blow, these persons continued to beat. Therefore, I injured Kanaiyalal, Ranchhoddas and Fufaram for to defend myself. This incident took place on the bridge of Chhaparia canal because we had run towards our house as we saw these persons coming with sticks and pipes from the house of Kanaiyalal. However, I was caught in the middle of the bridge of Chhaparia canal which is about 50 ft. from cycle cabin."

From this further statement, it is clear that Makbulsha and Hajimsha, accused No.1 & 2 very well knew Fufaram, P.W.6. From this defence, it is also clear that there are knife injuries on the person of P.W.6, 7 & 8. If as many as 7 persons have caught hold of one person, and said 6 to 7 persons were armed with sticks and pipes, would a single individual have an opportunity to take out knife from his pocket and inflict blow not on one but on all the four? This does not seem probable. However, the fact emerging from this statement is that initially accused Nos.1, 2 & 3 were present. Accused Nos.1 and 2, had run away and he assaulted. The fact is that P.W.6 had given the name of all the three accused. In our opinion, the same is further corroborated by the further statement of accused No.3. Fufaram, P.W.6, is candid to admit that he came to know the names of the accused after he was admitted in the hospital. In the cross-examination he has again at some stage said that he came to know about the names of the accused when he was taken in the hospital. Fufaram is an injured witness. Possibly, an illiterate one, looking to his occupation. He is employed with Kanaiyalal since a month. Therefore, it can be said that he may not lie before the Court. He is also assaulted simply because he is an employee. Therefore, in our opinion, we do not find any reason to reject his evidence. The learned Sessions Judge has rightly accepted his evidence.

17. The genesis of the incident, as it transpires from the record is that Kanaiyalal cut a joke on Mumtazbibi. Ex.56 on record shows the scene of offence. On totality of the evidence on record, we may be able to read the map, though the map itself is not clear. There is a bridge on canal. On the north side of that bridge, there is a road leading to cycle shop of the accused and on the south side of that cycle shop, after leaving road and some houses the house of Kanaiyalal is located. On the east of the bridge, a road leads to Chhaparia where the accused reside. On leaving that bridge over canal, there are cross roads on the eastern side. Of the cross roads eastern road leads to Chhaparia. Southern road leads to Motipura and the place of incident is shown on the extreme eastern end of the bridge on the southern edge of the bridge. According to the prosecution, when Kanaiyalal was not found at his house, all the accused appeared to be in wait for him near the bridge. When Kanaiyalal was going for delivery of goods towards Motipura, he was intercepted at the end of the bridge on the eastern side. Kanaiyalal, P.W.7, in his evidence has stated that he knew all the accused by name and face as they are residents of village Chhaparia. Accused Nos.1 & 2 are brothers and accused No.3 is their employee. He has further said that in the morning of 18th July, 1989, when he returned home, his brother Madanlal told him that accused Makbulsha, Hajimsha and Farooq had come at their house and were giving abuses. Madanlal had told that those persons were saying that he has cut joke against the aunt of Makbulsha and they were, therefore, uttering abuses. Madanlal also told him that Makbulsha had an iron strip, Farooq had nothing with him and Hajimsha had an iron pipe. Madanlal also told him that they were uttering that they will not leave Kanaiyalal alive. According to Kanaiyalal, he told Madanlal and his father that they are telling lie and he has not cut joke with anyone. Kanaiyalal in his evidence further stated that "thereafter keeping the bags of scrap of betelnut in front of the scooter, I was going towards Motipura through the bridge on canal. All the accused were standing on the bridge of canal. They caught the handle of my scooter and stopped it. Makbulsha inquired as to why I have cut joke at his aunt. By the time I was explaining, Farooq gave a blow of knife on my left side and Makbulsha started beating me with iron strip and Hajimsha gave blow on my back with iron pipe. Then the scooter got free from my hands and I fell down. I tried to run towards my house. However, I fell down after few steps. On hearing my shouts, my brother Madanlal had come. He was followed by Ranchhoddas with whom Fufaram was there. While Farooq was bout to give me a knife

blow, my brother caught hold of his hand. The other two accused with their respective weapons assaulted my brother. My brother has caught hold of the hand of Farooq which held the knife. That hand was released. Then Farooq gave knife blow to my brother. When my servant Fufaram and my father Ranchhoddas tried to rescue him, they were also assaulted. Makbulsha had an iron strip. Madanlal had fallen down. The stick was raised to inflict blow on Madan, however it fell on the head of Farooq. By that time people gathered and the accused ran away towards Chhaparia."

18. It will be relevant to state before appreciating the evidence of this witness that the incident of Mumtazbibi is alleged to have taken place two days before this incident. After the complaint against the accused was filed, Mumtazbibi also filed complaint and thereafter complaint by accused is also filed. Complaint against the accused was filed at 1.30 p.m. (Ex.39), while complaint by Mumtazbibi was filed at 2.00 p.m. (Ex.52) and complaint by accused is filed at 2.30 p.m. (Ex.50). If the accused was really aggrieved by the incident of Mumtazbibi who conveyed it to accused No.1, it may be that accused may have decided to take action in their own way without lawful recourse. This appears so from the following facts. There was no reason for the accused to go to the house of the victims or to convey the message through Fufaram to call Kanaiyalal at the cycle shop. In any case, the accused wanted to tell something to Kanaiyalal with respect to the incident of Mumtazbibi. According to P.W.7, before he could give explanation about the incident, he was assaulted. When the accused comes with a theory of self-defence, the fact emerges is that the incident has taken place. The short question is whether the incident took place in the manner as stated by the prosecution witnesses or as alleged by the defence. The evidence of Fufaram is corroborated by the evidence of Kanaiyalal and the defence is not able to show anything from the evidence of Kanaiyalal to not accept his evidence. It is alleged that when Kanaiyalal was unconscious at the relevant time till next day, then how his statement came to be recorded. That very analogy will also apply to defence who wants to rely on the alleged previous statement made before the Executive Magistrate. If he was unconscious till next day how magistrate recorded his statement. Theory of unconsciousness stands ruled out. The evidence of Kanaiyalal an injured witness is also corroborated by the evidence of his father Ranchhoddas.

19. According to the prosecution, on hearing the

shouts, Madanlal went towards the bridge. Madanlal was followed by Ranchhoddas and Fufaram. Ranchhoddas, P.W.8, has stated that on the day of incident, Madanlal had come to the house at Shaktinagar. He further deposed that "I was sitting there. Fufaram was cutting betelnuts. I know all the three accused. They have come to my house. Makbulsha had an iron strip, Hajimsha had an iron pipe and Farooq had a knife. They inquired from me where is Kanaiyalal. I told them that he had gone to market. Hajimsha told me that he has cut a joke on my aunt and we will kill Kanaiyalal, we will not spare him, whatever may happen. He was persuaded saying that why should you quarrel. I also told them that I will tell Kanaiyalal. They then went away. ..... By about 11.00 a.m. Kanaiyalal returned home. My son Madanlal told Kanaiyalal that Farooq, Makbulsha and Hajimsha had come to the house and were telling that you have cut a joke on Mumtazbibi. Kanaiyalal told that he has not cut joke on anyone. On my inquiry also, Kanaiyalal told me that he has not cut joke on anyone. Then Kanaiyalal took the scrap of betelnut in a bag and went to Motipura on scooter. Thereafter Madanlal has gone on terrace to bring down betelnut. Madanlal then shouted that Kanaiyalal is being assaulted. He came down and rushed towards the place of incident. I went after Madanlal and Fufaram also followed me. When we reached on the bridge on canal, Kanaiyalal was lying injured. All the three accused were present. Seeing Madanlal, accused Farooq rushed to assault him. Madanlal, therefore, caught hold of his hand which had a knife. Makbulsha and Hajimsha inflicted blows by pipe and sticks on the hand of Madanlal. Farooq therefore, escaped from the catch of Madanlal. On Farooq being released, he gave knife blows to Madanlal. Makbulsha also gave blows with iron strip to Madan. At that time, Farooq was injured on his head. I also intervened to rescue. Farooq therefore gave me a knife blow on my left side. Makbulsha gave me a strip blow on my waist. Hajimsha gave pipe blow on my private part. Farooq gave knife blow to Fufaram. Thereafter many persons gathered and accused ran away."

20. In the cross-examination, this witness has stated that he was conscious when his statement was recorded by the Police. He has denied that his two sons and some other Marwadis had gone to the shop of Farooq and assaulted him and they were armed with pipe, sticks and knife. So far as the evidence of this witness is concerned, defence is not able to place anything on record by which the evidence of this witness may become doubtful.

21. Evidence of these three witnesses, viz. P.W.6, 7 & 8, is challenged on the ground that their version is not corroborated by medical evidence. It is the case of the prosecution that accused No.1 had an iron strip and accused No.2 had an iron pipe and accused No.3 had a knife. Dr. Manish, P.W.1, has referred to the injuries of P.W.6, 7 & 8, which respectively are as under:

P.W. 6 "1. An incised wound on the back of the left scapular region admeasuring 3 cm x 1 cm x 0.5 cm.

2. Tenderness on both lumber region."

P.W.7 "1. An incised wound on the left mid-arm at the anterior aspect. The size of the injury was 2.5 cm by muscle deep.

2. CLW on occipital region, irregular in shape, admeasuring 3 cm x 1 cm.

3. Contusion on left upper arm, admeasuring 6 cm x 3 cm.

4. An incised wound on the back below angle of left scapula admeasuring 4 cm x 1 cm by muscle deep.

5. An incised wound on the left lumber region in size 2 cm x 1 cm muscle deep."

P.W.8 "1. An incised wound above left iliac crest.

2. Tenderness over right testis."

It is contended by learned defence advocate that there is no injury on the back of Ranchhoddas, P.W.8. Injuries of all the PWs, namely, P.W.6, 7 and 8 do not appear to be by hard blunt substance. Accused Nos.1 & 2 who were armed with iron strip and iron pipe, who according to the say of accused No.3 have already run away and have not caused any injury and it is only accused No.3 who has caused injuries as stated by him in his further statement. P.W.6 had injuries of tenderness on both lumber region and P.W.8 had injury of tenderness over right testis. This injury, in our opinion, particularly of P.W.8 is corroborated by his say that he was injured on his private part. According to the Doctor, P.W.1, this injury of tenderness can be caused by hard and blunt

substance. It is alleged that accused 1 & 2 had iron strip and pipe which can be said a hard and blunt substance. It is not even the suggestion of the defence that the injuries of tenderness were caused by fall or a strike with some substance. Thus, in our opinion, medical evidence of doctor, P.W.1 corroborates the evidence of the prosecution witness P.W. 6, 7 & 8 that they were injured by accused.

22. It is not disputed that Madanlal died a homicidal death. Dr. Jayanand, P.W.2 after referring to the injuries on the person of Madanlal has stated that all the injuries were antemortem and the deceased has died due to shock resulting from internal haemorrhage, massive maemathorax due to injury over the left lung and injuries over root of ascending aorta due to penetrating wounds on left side of the chest. The injuries were sufficient in the ordinary course of nature to cause death. Therefore, it cannot be said that the learned Sessions Judge has erred in accepting the evidence of P.W.6, 7 & 8.

23. Learned advocate Mr Amin has contended that in view of the evidence on record, the conviction of accused No.1 & 2 under section 302 read with 34 is bad. He contended that at the relevant time, as per the say of accused No.3, they escaped. However accused No.3 who was also trying to ran away was caught hold of by the assailants namely, P.W.6, 7 & 8 and certain others and was assaulted. As discussed earlier, from the evidence of P.W.6, 7 & 8, it is clear that accused No.1 and 2 were already there and they are charged under section 302 read with section 34 of the IP Code. Section 34 is merely a rule of evidence. Ordinarily, in criminal law, the principle of vicarious liability does not apply. But section 34 provides for such liability in criminal law. Section 34 speaks that when a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone. In the instant case, accused No. 3 was with accused No.1 and 2 as proved by evidence of P.W.6, 7 & 8. Accused No.1 & 2 had an intention to assault and do away with Kanaiyalal as he had cut a joke against the aunt of accused No.1. If accused No.1 & 2 were not acting in furtherance of intention with accused No.3, but were acting independently, then why they have gone to the house of Kaniayalal and when Kanaiyalal was not found, they have gone on the canal and were in wait for Kanaiyalal. It was accused No.3 who had accompanied them and had joined them knowing their intention. It is not that they were all simply present at the time of incident. They have

assaulted P.W.6, 7 & 8 and they are injured by the weapon held by them and the involvement of accused Nos.1 & 2 is corroborated by medical evidence also.

24. Learned advocate for the accused have contended that the evidence of all these witnesses is suspicious and have suppressed the genesis. This can be inferred as they have not explained the injury on the person of accused No.3. Injury on the person of accused No.3 are as under :

"(1) CLW on (Lt) penital region. It is 4x3x5 cms.

(2) Swelling on (Lt) penital region above same region.

(3) Multiple contusion on back of chest.

(4) Incise wound on (lt) hand. It is 3x5 cms.

(5) Incise wound on base of (Rt) middle finger at metacarpo-phalangeal joint at darsal aspect. It is 1x5 cms."

He had three incise wounds and two superficial injuries, one is swelling and other contusion. When in the heat of the moment the incident took place, it is not expected of witnesses or victims to go on noting that any injury if caused to other party, then where the same is caused. In our opinion, the question may arise if it is a case that accused were assaulted by victims. Apart from this, injuries on the person of accused No.3 is not that noticeable as they have ran away after the assault. Therefore, non-explanation of the injuries on the person of accused No.3 will not adversely affect the prosecution case more particularly when there is cogent ocular evidence It will be relevant to state that accused No.3 was arrested on the very day at 21.35 hours as shown in arrest panchnama at Ex.26. If one reads Ex.26, it specifically reads that there are no visible marks of injury on the person of the accused. His clothes are not stained with blood. When he was specifically looked on by panchas before arrest to see whether accused has any injury on his person then no visible marks of injuries were found, it will be rather inappropriate or unreasonable to ask prosecution to explain the injuries found by Doctor on the person of the accused. No doubt, the Supreme Court in the case of Laxmi Singh v. State of Bihar, 1976 SC 2236 in para 12 of the judgment, it is

held as under:

> "It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:
>
> (1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
>
> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
>
> (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.
>
> The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."
>
> xxxx
>
> xxxx
>
> We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima, Criminal Appeal No.67 of 1971n decided on March 19, 1975 (Reported in AIR 1975 SC 1478) there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.

So far as the present case is concerned, as stated hereinabove, even in the arrest panchnama of the accused,

injuries are not noticed by the Panchas meaning that the injuries sustained are minor and/or superficial. Therefore, there is no question of adverse inference to be drawn against the prosecution for non-explanation of injuries on the person of the accused.

25. Learned advocate Mr Amin has relied on a judgment of this Court in the case of Govindbhai M. Raval v. The State of Gujarat, 1997(2) G.L.H. 302, wherein it is held in para 9 as under :

> " 9. ..... Thus, when it is proved by the defence that accused Nos.1 & 2 were injured during the course of scuffle and accused No.1 had as many as six injuries and accused No.2 had injury on the head, the same has not been explained by the prosecution witnesses. This suggests and makes us to lead to the conclusion that the prosecution witnesses are suppressing the genesis of the case. When the prosecution witnesses are not coming with correct genesis before the Court it is difficult to disbelieve the case of the defence. Thus, the evidence of prosecution witnesses, in our opinion, being of related and interested witnesses, the say of the accused renders it more probable and the case of the prosecution becomes doubtful. Thus, when the case of the accused is that in self-defence, he has injured deceased Shankar, that case become probable, then it is necessary to decide whether he had exceeded the right of self-defence or not."

The said judgment is based on the judgment in the case of Laxmi Singh (supra). In that judgment, the conclusion was arrived at in view of the facts and circumstances of that case. However, in our opinion, the ratio of said judgment does not help the defence here in facts and circumstances of this case.

26. In view of the above discussion, the appeals are liable to fail and are hereby dismissed.

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(vjn)